MOTION FILED

AUG 15 1974

No. 73-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ERNEST FRY, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the Temporary Emergency Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR COALITION OF AMERICAN PUBLIC EMPLOYEES

A. L. ZWERDLING
1211 Connecticut Avenue, N. W.
Washington, D. C. 20036
General Counsel, American Federation of State, County and Municipal Employees, AFL-CIO

ROBERT H. CHANIN
1201 16th Street, N.W.
Washington, D. C. 20036
General Counsel, National Education Association

ROBERT M. TOBIAS
1730 K Street, N.W.
Washington, D. C. 20006
General Counsel, National Treasury Employees Union

GEORGE KAUFMANN
1735 New York Avenue, N.W.
Washington, D. C. 20006
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

MOTION

Interest of the Coalition of American Public Employees ii

CONCLUSION iv

BRIEF

ARGUMENT:

Application of a General Wage Stabilization Program to State and Local Employees Is a Rational Exercise of the Commerce Power and Is Therefore Constitutional 2

CONCLUSION 16

INDEX OF CITATIONS

CASES:

Amalgamated Meat Cutters & Butcher Workmen v. Connally, (D.C.D.C. 1971) 337 F.Supp. 737..... 13
California v. Taylor, 353 U.S. 553..... 12
Case v. Bowles, 327 U.S. 92 .....3, 12
Coan v. California, 113 Cal. Rptr. 187, 520 P.2d 1003 .....5, 9, 13
Collector v. Day, 11 Wall. (78 U.S.) 118..... 11
Davies Warehouse v. Bowles, 321 U.S. 144.....13, 15
Employees v. Missouri Public Health Dept., 411 U.S. 279 12
Graves v. People of New York ex rel O'Keefe, 306 U.S. 466 11
Helvering v. Gerhardt, 304 U.S. 405 10
Helvering v. Powers, 293 U.S. 214..... 11
Hopkins Savings Association v. Cleary, 296 U.S. 315.. 5
Leslie Miller, Inc. v. Arkansas, 352 U.S. 187..... 3
Maryland v. Wirtz, 392 U.S. 183 .....6, 7, 8, 9, 12, 15
Metcalf & Eddy v. Mitchell, 269 U.S. 514..... 11
Murray v. Wilson Distilling Co., 213 U.S. 151..... 11
New York v. United States, 326 U.S. 572.....10, 12

Page

Ohio v. Helvering, 292 U.S. 360 11
Oklahoma v. Civil Service Commission, 330 U.S. 127 ..... 3, 5, 12
South Carolina v. United States, 199 U.S. 437 11
Sperry v. Florida Bar, 373 U.S. 379 2
United States v. California, 297 U.S. 175 11
United States v. Darby, 312 U.S. 100 ..... 3, 4, 9
United States v. Ohio, 385 U.S. 9 9
Wickard v. Filburn, 317 U.S. 111 9

UNITED STATES CONSTITUTION:

Article I, Sec. 8, Cl. 3 6
Amendment X 2, 3, 4, 5, 15
Amendment XIV 15

STATUTES:

Economic Stabilization Act, P. L. 91-379, August 15, 1970, as amended by P.L. 93-28, April 30, 1973, and P.L. 92-210, December 22, 1971 ... 5, 6, 7, 8, 9, 13, 15

Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, etc., 29 U.S.C. § 201 *et seq* 6, 7, 9, 12

Hatch Act, 53 Stat. 147, as amended, 54 Stat. 767:
§ 12(a) 3, 4
§ 12(b) 3

MISCELLANEOUS:

Brief of Appellants, No. 742, Oct. Term 1967 12

Galbraith, J. K., *The Affluent Society*, Houghton Mifflin Co., 1960; 2d Ed. 1969 14

Hearings on H. R. 11309, 92d Cong. 1st Sess. parts 1 & 2 p. 342 8

II Annals of Congress 1897 3

117 Cong. Rec. 43,674 ..... 8, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-822

ERNEST FRY, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the Temporary Emergency Court of Appeals

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Coalition of American Public Employees hereby respectfully moves for leave to file a brief *amicus curiae* in the instant case in support of the position of the Respondent, as provided for in Rule 42 of the Rules of this Court. The consent of the Solicitor General, counsel for the Respondent, has been obtained. Counsel for Petitioners has refused his consent.

INTEREST OF THE COALITION OF AMERICAN PUBLIC EMPLOYEES

The Coalition of American Public Employees (Coalition) is an association of three organizations, American Federation of State, County and Municipal Employees (AFSCME), National Education Association (NEA), and National Treasury Employees Union (NTEU), each of which represents employees for purposes of collective bargaining and for other mutual aid and protection. AFSCME has approximately 700,000 members who are employees of state and local government bodies. NEA is the largest teacher organization in the United States, with a membership of more than 1.4 million professional educators, most of whom are teachers or administrators in public educational institutions. NTEU represents approximately 65,000 non-supervisory employees of the United States Department of the Treasury.

Our interest in filing a brief *amicus curiae* can best be expressed as a response to the question implicit in the letter of counsel for petitioner denying consent to file that brief. Counsel wrote, "I can't understand why [AFSCME and NEA] would be anxious to take a position adverse to tens of thousands of public employees in Ohio." The answer is that after careful consideration the Coalition, by far the largest organization representing public employees, has taken the overall position that Congress does have the power to regulate wages and hours of public employees. That view of the Constitution was most recently approved and applied in *Maryland* v. *Wirtz,* 392 U.S. 183. AFSCME participated as *amicus* when that case was in the District Court and, through its parent federation, the AFL-CIO, as *amicus* in this Court. We cannot do otherwise in this case merely because the

same principles would require a result adverse to the directly affected public employees. For, the Constitution does not permit this Court "to carve up the commerce power" (*id.* at 196) merely because public employees would "feel the pinch" of its exercise.

Of course, we sympathize strongly with the situation of petitioners and the other public employees of Ohio and other States who, under the Economic Stabilization Act, have been denied wages to which they would otherwise be entitled. Specifically, we agree with what the State of Ohio says in its brief *amicus* (p. 7): "Traditionally, state employees have been under compensated in comparison with their private counterparts * * *." We have been saying the same thing for many years in negotiations with public employers in leading the fight of public employees to obtain equity. But Congress has chosen, in the exercise of its plenary commerce power, to subordinate the interest of public employees in achieving wage parity with the private sector and the State's related interest in attracting employees (Ohio Br. p. 7), to other policies, such as general stabilization of wages and prices, and equality of sacrifice among all employees. Since we are unaware of any principled distinction between this case and this Court's prior precedents regarding the Commerce Power and the Tenth Amendment (and none having been offered by Petitioners or any of the five *amici* who support them) we must conclude that reversal of the decision below could only introduce chaos into this area of constitutional law.

We anticipate that the United States will fully discuss the purposes and legislative history of the Economic Stabilization Act and the constitutional precedents which validate its application to petitioners. Our tendered brief deals with these matters

primarily as background, except that we stress the importance of one decision (*Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127) which appears to have escaped the parties' attention. Instead, we shall concentrate on the dominant argument of all those who support petitioners—that the judgment below creates novel and mortal perils for State sovereignty—and show that their fear has its source not in reality, but in the felt necessities of advocacy.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Respondent.

Respectfully submitted,

A. L. ZWERDLING
1211 Connecticut Avenue, N. W.
Washington, D. C. 20036
General Counsel, American Federation of State, County and Municipal Employees, AFL-CIO

ROBERT H. CHANIN
1201 16th Street, N.W.
Washington, D. C. 20036
General Counsel, National Education Association

ROBERT M. TOBIAS
1730 K Street, N.W.
Washington, D. C. 20006
General Counsel, National Treasury Employees Union

GEORGE KAUFMANN
1735 New York Avenue, N.W.
Washington, D. C. 20006
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-822

ERNEST FRY, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the Temporary Emergency Court of Appeals

---

BRIEF AMICUS CURIAE FOR COALITION OF AMERICAN PUBLIC EMPLOYEES

This brief *amicus curiae* is filed by the Coalition of American Public Employees, contingent upon the Court's granting the foregoing motion for leave to file the brief. The interest of the Coalition is set out at pp. ii-iv of that motion.

ARGUMENT

APPLICATION OF A GENERAL WAGE STABILIZATION PROGRAM TO STATE AND LOCAL EMPLOYEES IS A RATIONAL EXERCISE OF THE COMMERCE POWER AND IS THEREFORE CONSTITUTIONAL

Introduction

Petitioners state:

> "This brief is short and there are few cases cited herein, because we cannot win a contest with counsel for the United States of America, citing all the cases over the last two hundred years concerning the Tenth Amendment to the U.S. Constitution. There is not much left of the Tenth Amendment and if this case is affirmed, and the states can no longer pay their employees what the various legislatures enact, then the Amendment will become almost meaningless." (Pet. Br. p. 7) [1]

This concession is entirely justified. It is well settled that the Tenth Amendment is indeed "meaningless" as a limitation on the legislative power delegated by the Constitution. As the late Chief Justice explained for a unanimous Court in *Sperry* v. *Florida Bar,* 373 U.S. 379, 403:

> "Congress having acted within the scope of the powers 'delegated to the United States by the Constitution,' [there the power to grant patent rights] it has not exceeded the limits of the Tenth Amendment despite the concurrent effects of its legislation upon a matter otherwise within the control of the State. 'Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.' II Annals of Congress 1897 (remarks of Madison). The Tenth Amendment 'states but a truism that all is retained which has not been surrendered.' United States v. Darby, 312 U.S. 100, 124; Case v. Bowles, 327 U.S. 92, 102. Compare Leslie Miller, Inc. v. Arkansas, 352 U.S. 187. The authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature."

[1] "Pet. Br." refers to Petitioners' Brief. The briefs of the respective State *amici* will be referred to as "Ohio Br.", "Cal. Br.", and "Mo. Br."; the briefs of the employee groups will be referred to as "Cal. Emp. Br." and "Assem. Br.".

One precedent deserves special mention in response to the dominant argument on petitioners' side that the Tenth Amendment forbids interference with State personnel policies. In *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, the State challenged a determination by the Civil Service Commission made pursuant to § 12(a) of the Hatch Act.[2] Section 12(a) provided, in essence, that "no officer . . . of any State . . . agency whose principal employment is in connection with any activity which is financed in whole or in part by loan or grants made by the United States . . . shall . . . take any active part in political management or political campaigns." Section 12(b) provided that if the Commission after hearing determined that a violation of § 12(a) had occurred, it might determine that the violation is such that it "warrants the removal of the officer" and provided further that "if the officer . . . has not been removed from his office . . . within thirty days after notice of [such] determination . . . the Commission . . . shall make . . . an order requiring [the withholding] from its loans or grants . . . [of]

[2] 53 Stat. 147, as amended, 54 Stat. 767, 18 U.S.C.A. § 61 l.

an amount equal to two years' compensation at the rate such officer . . . was receiving at the time of such violation." After a hearing, the Commission determined that an Oklahoma Highway Commissioner had violated § 12(a) and that the violation warranted his removal. The State instituted review proceedings in the federal courts, and those proceedings ended in a determination by this Court upholding the Commission's action and rejecting the State's Tenth Amendment claim:

> "Petitioner's chief reliance for its contention that § 12(a) of the Hatch Act is unconstitutional as applied to Oklahoma in this proceeding is that the so-called penalty provisions invade the sovereignty of a state in such a way as to violate the Tenth Amendment by providing for possible forfeitures of state office or alternative penalties against the state."
>
> * * *
>
> While the United States is not concerned and has no power to regulate local political activites as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.
>
> The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in United States v. Darby, 312 U.S. 100, 124, the Tenth Amendment has been consistently construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid."[3]

The Court thus sustained a federal regulation directly affecting State employees who perform a wide range of functions, and which, by restricting these employees' political activity, intrudes far more directly on State concerns than does the Economic Stabilization Act, which deals only with the cash nexus between employer and employee. Moreover, the immediate result of the *Oklahoma* case was to require the State to choose between discharging a high-ranking official whom the State deemed qualified, or forfeiting substantial federal funds. Yet the Tenth Amendment provided no protection to the State once it was established that the regulation was within the delegated power of Congress.[4]

The short of the matter is that in determining the constitutionality of an Act of Congress as it affects the States the only relevant inquiries are whether the enactment is within the legislative power delegated to Congress, and its application is rational. It is these issues which we now discuss.

---

[3] 330 U.S. at 142-143, footnotes omitted.

[4] While the Supreme Courts of Ohio and California have held that the Economic Stabilization Act is not applicable to State employees, only one member of either Court based his decision on Constitutional grounds. In his concurring opinion in *Coan* v. *California*, 113 Cal. Rptr. 187, 520 P.2d 1003 (reprinted at Cal. Br. pp. 21-59), Mr. Justice Mosk invoked the Tenth Amendment, citing *Hopkins Savings Association* v. *Cleary*, 296 U.S. 315, 337. But in the sentence immediately following that quoted by Justice Mosk (Cal. Br. p. 37), Mr. Justice Cardozo was careful to point out:

> "We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount." (296 U.S. at 338).

I.

The Economic Stabilization Act of 1970 is assuredly an exercise of the Congressional power "to regulate commerce *** among the several States" (Art. I, § 8, Cl. 3). It is not contended by any of the briefs on petitioners' side that the stabilization of wages and prices is not a valid exercise of that power. The only challenge made is to the application of that statute to the wages and salaries paid by the States to their employees. The question whether the Commerce Power authorizes inclusion of State employees in a general federal regulation of wages is, as the court below recognized, controlled against petitioners by *Maryland* v. *Wirtz,* 392 U.S. 183. In *Maryland* v. *Wirtz,* this Court sustained, as a valid exercise of the Commerce Power, amendments to the Fair Labor Standards Act (FLSA) [5] whereby its wage and hour provisions were made applicable to employees of certain state and local schools and hospitals.

In *Maryland* v. *Wirtz,* the appellant States had argued that application of the FLSA to them was unconstitutional because it interfered with "sovereign State functions", see 392 U.S. at 193. The same contention is presed here, although with the emotive thrust of even more extravagant rhetoric.[6] Once again, there-

[5] 52 Stat. 1060 *et seq.* as amended by 80 Stat. 831, 832.

[6] See *e.g.*, Ohio Br. p. 13: "If [the Court sustains this] much more serious and devastating form of regulation, then no limitation can be placed on federal power and state sovereignty is dead."; Ohio Br. p. 18: "Congress * * * has advanced one step further towards the destruction of the States as effective political entities * * *"; Mo. Br. p. 11: "startling and unprecedented intrusion of the federal government into the State's legislative chambers and executive office."; Cal. Emp. Br. p. 6: "activities which are unique to a State and are essential to its preservation as a viable political sovereign"; Cal. Emp. Br. p. 13: "If the imposition of wage ceilings imposed upon state governments by Congress under the guise of its power to regulate commerce is upheld, the death knell of States as viable political sovereigns will be sounded."; Assem. Br. p. 6: "virtually destroy[s] the basic function of state sovereignty".

fore, "it is important to note exactly what the [challenged] Act does" (*id.*). The only activity of the States which is regulated is the payment of wages to their officers and employees, exactly as in *Maryland* v. *Wirtz.* Even as the Fair Labor Standards Act did not "affect the way in which school and hospital duties are performed" (*id.*) except by establishing a minimum wage and a maximum limit of hours unless overtime is paid, so the Economic Stabilization Act does not determine how the duties of "state highway patrolmen, traffic signal repairmen, tax investigator agents, prison guards" (Pet. Br. p. 4) or even judges (Mo. Br. p. 12) are to be performed,[7] except insofar as the establishment of a maximum wage may have that effect. Thus, the claim that Congress is seeking "under guise of the Commerce Power" to regulate "state government itself" (Ohio Br. p. 6) or "the State as an entity" (Mo. Br. p. 11) is, like the similar characterization of the issue by appellants in *Maryland,* "not factually accurate" (392 U.S. at 193). Here, as there, "Congress has 'interfered with' these state functions only to the

[7] In *Maryland* v. *Wirtz,* the Court noted that one of the judges in the District Court had been troubled by the impact of the FLSA's overtime provisions on schools, which were given no special treatment. This Court said:

> "The Act's overtime provisions apply to a wide range of enterprises, with differing patterns of worktime; they were intended to change some of those patterns. It is not for the courts to decide that such changes as may be required are beneficial in the case of some industries and harmful in others." (392 U.S. at 194, n. 22).

extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce * * *" (*id.* at 193-194).

Maryland v. *Wirtz* is sought to be distinguished on the ground that the activities of the affected employees here have no counterpart in the private sector (Pet. Br. pp. 3-4) or that they are "unique" to the states (Cal. Emp. Br. pp. 6, 7, 10, 15, 16; Mo. Br. pp. 12, 18, 19). This proposed distinction is without factual basis or legal merit. As already noted, the activity which is regulated is the payment of wages, and this is an activity which the States perform in common with many millions of private employers. Indeed, the Act regulates the wages and salaries paid by the State in large part because this activity is not unique or distinguishable from the payment of wages and salaries by private employers: When Congress determined to embark upon nation-wide stabilization of wages and prices, it determined that state employees should be subject to the same standards in order for it to operate fairly.[8] Whether that judgment was "rational" is a quite separate question, which we discuss at pp. 13-15 *infra*. But it simply cannot be said that by exercising wage and salary controls Congress has regulated a "unique" state function, or has determined "that any time a state functions as a state, interstate commerce is affected because the performance of each activity necessitates the purchase of goods or the payment of money for wages and salaries." (Ohio Br. p. 8). Rather, as in *Maryland* v. *Wirtz*, when the State is "engaging in economic activities [the payment of

[8] See 117 Cong. Rec. 43,674 (Remarks of Sen. Tower); Hearings on H.R. 11309, 92d Cong. 1st Sess. parts 1 & 2 p. 342 (Testimony of Secretary Connally).

wages] that are validly regulated by the federal government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." 392 U.S. at 197.

Contrary to the implication of Petitioners' argument the existence of competition is not the *sine qua non* of exercise of the Commerce Power, but was simply one of the bases for applying the FLSA to an entire enterprise rather than to those employees only who are themselves engaged in commerce or in the production of goods for commerce, see 392 U.S. at 188-191. When the Court considered the constitutionality of applying to public schools and hospitals the same law as private schools and hospitals, the existence or nonexistence of competition between the public and private sectors was not even considered. The decisive question there, as here, was "whether the [regulated] class is 'within the reach of the federal power" (392 U.S. at 192, quoting *United States* v. *Darby*, 312 U.S. 100, 120-121). The class defined by the Economic Stabilization Act is all employees who receive (or conversely, all employers who pay) wages.[9] That class is within the reach of the Commerce Power because it is appropriate for the purpose of stabilizing the national economy, and its

[9] Once this definition of the regulated class of activities is understood, it is quite irrelevant that the activities of some of those within the class are not themselves in interstate commerce. See *United States* v. *Ohio*, 385 U.S. 9, following *Wickard* v. *Filburn*, 317 U.S. 111. Accordingly, in *Maryland* v. *Wirtz*, the Court said:

> "The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest." (392 U.S. at 192-193).

Its ghost, however, still walks. See that portion of Justice Mosk's concurring opinion in *Coan*, p. 5, n. 4, *supra*, which is quoted at Pet. Br. p. 6.

propriety does not depend on the existence of competition between public and nonpublic employees.[10] For, "while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved." 392 U.S. at 196-197.

Petitioners and the *amici* who support them uniformly invoke *New York* v. *United States,* 326 U.S. 572, relying on language in the opinions of Chief Justice Stone and Justice Frankfurter which acknowledges limitations on the power of the federal government to tax state governments and *vice versa.*[11] While the result in that case was to reject New York's claim of immunity, we need not and do not disagree with the expressions on which petitioners and those who support them rely. For there are two separate reasons why the tax immunity cases provide no comfort to petitoners:

First, even in the narrow area of tax immunity, the far more closely analogous question is whether the federal government has power to tax the income of state employees and state officials. It has been settled since *Helvering* v. *Gerhardt,* 304 U.S. 405, that such wages and salaries are not immune from federal taxation, a result reached notwithstanding the argument that a tax on State officials' salaries has a necessary economic

[10] This is not to say that there is no competition between wages in the public and private sector, even where the state activity for which the public employee works is not in competition with some private enterprise. Most secretarial skills, for example, can readily be transferred without regard to the nature of the work of the employer.

[11] Pet. Br. p. 6; Ohio Br. pp. 6, 16-18; Cal. Br. pp. 15-16; Mo. Br. pp. 12-13; Cal. Emp. Br. p. 10; Assem. Br. pp. 6, 9, 10.

impact on the States themselves. See 304 U.S. at 419-421.[12]

Second, this Court has expressly held that precedents limiting the federal government's power to tax states or their instrumentalities shed no light on the boundaries of the Commerce Power. In *United States* v. *California,* 297 U.S. 175, a unanimous Court held:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf & Eddy v. Mitchell, 269 U.S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. Helvering v. Powers, 293 U.S. 214, 225, Ohio v. Helvering, 292 U.S. 360, South Carolina v. United States, 199 U.S. 437, see Murray v. Wilson Distilling Co., 213 U.S. 151, 173, explaining South Carolina v. United States, supra. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized

[12] See also *Graves* v. *People of New York ex rel. O'Keefe,* 306 U.S. 466, 480-487, overruling *Collector* v. *Day,* 11 Wall. (78 U.S.) 118. The felt neccessity of one *amicus* nevertheless to rely on *Collector* v. *Day* (Mo. Br. p. 16) speaks for itself.

by Congress than can an individual." (*id.* at 184-185) [13]

The distinction thus drawn between the tax immunity and Commerce Power cases utterly undermines petitioners' case. For it establishes that it is entirely misleading, in considering the constitutionality of an exercise of the Commerce Power, to inquire into the nature of the State activity which is affected thereby. And it makes plain that neither "uniqueness" nor any other rubric can succeed, where the "governmental-proprietary" distinction has failed (see 392 U.S. at 195), to "carve up the commerce power" (*id.* at 198). [14]

[13] In this connection it is also instructive that Mr. Justice Black, who, together with Mr. Justice Douglas, dissented in *New York* v. *United States, supra,* wrote the opinion for the Court in *Case* v. *Bowles,* 327 U.S. 92, decided three weeks later.

[14] But see Cal. Br. pp. 14-15, which seeks to distinguish *Maryland* v. *Wirtz* on the ground that the functions of the employees there were purely "proprietary". When the Court observed in *Employees* v. *Missouri Public Health Dept.,* 411 U.S. 279, 284, that the schools and hospitals there involved were "not operated for profit [and] not proprietary", it did so in order to determine whether Congress had intended to exact a waiver of sovereign immunity. No constitutional issue was decided; indeed, the Court said also:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." (*Id.*).

It follows that the Economic Stabilization Act cannot successfully be attacked on the ground that it interferes with a State budgetary determination (Ohio Br. pp. 6-7; Mo. Br. p. 17; Cal. Br. p. 14). See also *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, 143, quoted at pp. 4-5, *supra.* Compare the argument in *Maryland* v. *Wirtz* that the FLSA regulates State functions "in a way that destroyed the fiscal independence and integrity of the States" (Brief of Appellants, No. 742, Oct. Term 1967, p. 50). It is likewise of no moment that the federal law overrides a State Civil Service Act (Cal. Br. p. 17; Cal. Emp. Br. pp. 28-30). See *California* v. *Taylor,* 353 U.S. 553, 566-567.

II.

We thus consider "whether there is a rational basis for regarding [the Economic Stabilization Act of 1970] as [a regulation] of commerce among the States". Cf. 392 U.S. at 198. We think there is, for the reasons stated by Justice Tobriner dissenting in *Coan* v. *California,* p. 5, n. 4, *supra:*

> "A primary purpose of the stablilization act, as stated in its section 202, is to stabilize the economy [and] reduce inflation in part by stabiliz-[ing] . . . wages [and] salaries." (See Amalagamated Meat Cutters & Butcher Workmen v. Connally (D.D.C. 1971) 337 F.Supp. 737, 749). Given this purpose, I have great difficulty believing that Congress intended to exempt the salaries of the nation's more than 10 million state and local governmental employees without clarifying this intention either with explicit statutory language or at least some exposition to this effect in the legislative record. Because large accessions of disposable income in the hands of so substantial a segment of the labor force could significantly affect demand and monetary stability, I cannot assume without basis that Congress intended to deny the executive branch the flexibility to prevent such accessions.
>
> Moreover, were state employees' salaries left unregulated, the federal government might encounter difficulty enforcing controls on private salaries. Critical to the success of much economic regulation is that the regulated parties must be convinced that they are receiving equitable treatment. Were state employees' salaries left free to rise, many private employees might resist controls placed on their salaries. (Cf. Davies Warehouse Co. v. Bowles (1944) 321 U.S. 144, 157-158 (Douglas, J., dissenting); Remarks of Senator Tower, 117 Cong. Record (1971) 43,674.)" [15]

[15] See Cal. Br. pp. 55-56 (footnotes omitted).

However, petitioners and three of the *amici* assert expressly that Congress had no rational basis for including wages and salaries paid by States, in the regulated class.[16] These *amici* make the related points that state employees are historically undercompensated, so that fairness does not require that their wages be included as part of a general regulation but actually requires their exemption; and that the impact of a wage freeze on states seriously and adversely affects their ability to recruit and thus the quality of government operations. (Pet. Br. p. 6; Ohio Br. p. 7; Cal. Emp. Br. p. 11, 31-35; Assem. Br. p. 13). The table at Cal. Emp. Br. p. 34 demonstrates the distressing tendency of increases of public employee wages to trail substantially behind those of employees in the private sector. And that brief points out that California has deliberately kept wages down lest it be in "unfair competition with private business".[17] So too, Professor John Kenneth Galbraith has observed that inflation strikes most directly at public employees and that in consequence "though the dedicated may stay in public posts, the alert go".[18]

The foregoing views make much practical sense. But the sole issue here is whether Congress could

[16] Ohio Br. pp. 19-23; Cal. Br. p. 11; Cal. Emp. Br. pp. 23-35.

[17] Cal. Emp. Br. pp. 28 and 30.

[18] John Kenneth Galbraith, *The Affluent Society* (Houghton Mifflin Co., 1960), pp. 264-266, quoted at Cal. Emp. Br. p. 33. (The quoted material is retained at pp. 234-235 of the second edition of this book, published in 1969.) Rather ironically, considering its unenlightened personnel policies as described at Cal. Emp. Br. pp. 26-32, 34, the State of California also refers to Professor Galbraith's analysis with approval (Cal. Br. p. 16, n. 11).

rationally determine that it would be more equitable to treat public employees as a class like other employees, and that the productivity objectives of the statute might be undermined if, by removing restrictions on wages paid by States, private employees were encouraged to transfer to public employment.[19] We think Congress *could* reasonably determine that State employees should be covered and that equitable adjustments should be established on a case-by-case basis by those charged with administering the Act. See p. 8, n. 8, *supra*. It would indeed be startling if this Court, which long ago abandoned the view that the Fourteenth Amendment enacts Mr. Herbert Spencer's Social Statics, were now to elevate the economic analysis of Professor John Kenneth Galbraith into constitutional dogma as a limitation on "the vast expanse of federal authority over the economic life of the * * * Nation" (392 U.S. at 196).

CONCLUSION

Petitioners and the *amici* who support them invoke the Tenth Amendment as a limitation on the Commerce Power notwithstanding this Court's repeated admonition that the Tenth Amendment does not limit any of the powers delegated to the federal government. They ask that prior precedent be abandoned without ad-

[19] Of course, Congress could have determined that the inherent reluctance of public employers to raise wages and the legislative and budgetary controls imposed by state officials would render unnecessary federal regulation of such wages. That was the judgment which underlay the exemption for public utilities which was at issue in *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, relied on at Ohio Br. p. 22. But neither that decision, which expressly disavowed the existence of a question of Congressional power (*id.* at 151), nor any other, establishes that Congress could not change its mind. Compare *Maryland* v. *Wirtz*, 392 U.S. at 199, n. 28.

vancing any principled rule of decision which would, if they prevail, mark the scope of the Commerce Power when it affects an activity of the States; *faute de mieux* they rest on undifferentiated, and surely chimerical, fears for the survival of "state sovereignty". They invite this Court to substitute its own economic judgment for that of Congress and thereupon to determine that it was irrational for Congress to include the wages of State employees in a general wage stabilization program. They are not entitled to prevail.

The judgment of the Temporary Emergency Court of Appeals should be affirmed.

Respectfully submitted,

A. L. ZWERDLING
1211 Connecticut Avenue, N.W.
Washington, D. C. 20036
General Counsel, American Federation of State, County and Municipal Employees, AFL-CIO

ROBERT H. CHANIN
1201 16th Street, N.W.
Washington, D. C. 20036
General Counsel, National Education Association

ROBERT M. TOBIAS
1730 K Street, N.W.
Washington, D. C. 20006
General Counsel, National Treasury Employees Union

GEORGE KAUFMANN
1735 New York Avenue, N.W.
Washington, D. C. 20006
Of Counsel